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No. 691

In the Supreme Court of the United States

OCTOBER TERM, 1960

FRANK BORDA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a; R. III,[1] 4-11) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1961 (R. III, 12). The petition for a writ of certiorari was filed on February 3, 1961. The

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[1] The record is in three volumes, referred to by their Roman numerals.

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the petitioner's conviction for the interstate transportation of a motor vehicle known to have been stolen.

2. Whether remarks in the prosecutor's closing argument constituted prejudicial error.

3. Whether the court's charge to the jury covered the necessity of a finding that the petitioner had knowledge that the motor vehicle had been stolen.

STATUTE INVOLVED

18 U.S.C. 2312 provides:

> Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

The petitioner was charged with the interstate ansportation of a stolen motor vehicle, which he new had been stolen, in violation of 18 U.S.C. 2312 R. I, 2). The jury found him guilty as charged (R. , 3), and he was sentenced to imprisonment for 3½ years (R. I, 7). On appeal (R. I, 8) the conviction was affirmed (R. III, 12).

1. A 1958 Ford station wagon assigned to Dever,

a salesman for Chestnut Motors, as a demonstrator (R. II, 4-5, 10, 14-15), was stolen after it had been parked in Collingswood, New Jersey, on the evening of November 29, 1957 (R. II, 5-6, 15-18, 28). Kayfield, another salesman for Chestnut Motors, had had dealings in Philadelphia with Solesbee, a buyer for Clary, a used car dealer, in Spartanburg, South Carolina (R. II, 25, 30, 42-43, 71-72).

On November 30, 1957, in Spartanburg, the petitioner and Kayfield negotiated with Clary and Solesbee for the sale of a Plymouth and the station wagon (identified as that assigned to Dever). The cars were in Spartanburg at the time (R. II, 32, 65-68). The petitioner, who did most of the negotiating for the sellers, stated that he wanted $2,500 for the two cars and would not take less than $2,000 (R. II, 32, 38, 40, 68).[2] He finally agreed to a price of $1,500 when Clary insisted that was all the money he had, the deal being conditioned upon a promise that $300 owed by Solesbee to Kayfield would be paid "up there" (in Philadelphia) on the following Monday (R. II, 32-33, 44-45, 68-69).

Cash in the amount of $1,500 was then paid to Kayfield who proceeded to make out the bill of sale. The petitioner stated that, since they did not have title to the cars, they would post-date the bill of sale by four days and Kayfield did so (R. II, 33, 38-39, 45, 46, 69). Clary then drove the petitioner and Kayfield to the airport (R. II, 34, 46). Dever had seen

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[2] Clary later sold the station wagon alone for $2,350, and testified that he valued the Plymouth at $1,300 (R. II, 40, 47).

the petitioner in Pennsylvania on two occasions prior to the loss of the car (R. II, 23-24).

Dever testified that, on the morning he took the witness stand, the petitioner came to his hotel room. In the presence of Mrs. Dever, the petitioner asked him to testify that he (Dever) had given Kayfield permission to take the station wagon (R. II, 22-23). Dever had not given such permission (R. II, 21).

The only defense evidence was a record of a prior plea of guilty by Kayfield for a violation of 18 U.S.C. 2312 in regard to the transportation of the same station wagon here involved (R. II, 91-92, 99).

2. During his closing argument the government attorney stated (R. II, 95):

> If you forget every other thing I am telling you or will tell you, remember this: Mr. Borda went to Mr. Dever's room this morning in the hotel and here's what he said as I put it down. * * * he said that Mr. Borda told him to say that "I gave"—that's Mr. Dever—"That I, Mr. Dever, gave Kayfield permission to take the car." That hasn't been denied. * * *

During the opening part of the closing argument the government attorney observed that Clary and Solesbee, although not angels, were local people who testified "how it was" (R. II, 94). In the closing half of his argument government counsel stated (R. II, 106-107):

> * * * What was Borda down here for? What was he down here for? What was he down in our community for? You can look at him. He's got no business down here like that. But Kayfield * * *

Mr. Watt [defense counsel]: Your Honor, I don't think the District Attorney has the right to make that statement.

Mr. Hines [government attorney]: You are right. I apologize.

The Court: He says he withdraws that.

Mr. Hines: * * * Kayfield came down here and * * * took his medicine * * *.

Is that what Borda is doing now? Borda says, "No, sir, I was down here; I didn't have anything to do with it. Just down here for the buggy ride." * * *

Is that an innocent man? Is he down here in our community with two cars—one stolen car, a Ford stolen car—and he had nothing to do with it? Are you going to swallow that kind of stuff? Personally, I just don't think you will.

3. In its final charge to the jury the court began with a statement that the petitioner was charged with the interstate transportation of the stolen Ford station wagon, and that "he then knew the said motor vehicle to have been stolen" (R. II, 108). After referring to the aider and abettor statute, the court continued (R. II, 109):

> Now, abet means to incite, encourage, instigate, countenance. * * * It means simply that if Borda, the defendant in this case aided, abetted, or helped, encouraged, and countenanced this man in any particular in transporting this automobile, that he would be just as guilty as if he transported the automobile himself.

Later in the charge, after referring to the principle that possession of a stolen vehicle in a state to which

it was recently transported from another state warrants the inference that the possessor participated in its interstate transportation in the absence of some explanation, the court stated (R. II, 110-112):

> In this case, there has been no testimony presented by the defendant to explain the defendant's possession. In connection, however, therewith, I charge you that the defendant has a right to sit silently and not take the witness stand. He has a right to stand on his Constitutional rights not to testify and it can't be used against him. He has exercised that right in this case and you can't use it against him. * * * The Supreme Court of the United States says that failure of the defendant to take the witness stand and testify in his own behalf does not create any presumption against him. "It must not permit that fact to weigh in the slightest degree against him, the defendant, nor should this fact enter into the discussion or deliberation of the jury in any manner."
>
> You can't presume he is guilty because he didn't take the witness stand. However, I continue about the other decisions of the Courts, which say this: "In prosecution for violation of this section—the one I have just read to you—knowledge that the automobile is stolen may be established by circumstances as well as by direct proof and the question is for you to determine whether he knew the car was stolen; whether he knew that it was; whether he aided or abetted in the transportation of it.
>
> "Possession by defendant of recently stolen automobile justifies the inference that possession is guilty possession and may be of controlling

> weight unless explained by circumstances or accounted for in some way consistent with innocence." That's the law, principle of law, you have to apply in deciding this case.

Later, in concluding the charge, the court stated (R. II, 113-114):

> After all, it resolves itself to a simple—applying the presumption of law of recently—possession of recently stolen automobile together with all the other law I have given you, after all is said and done, did the defendant here transport or aid and abet or help or assist in having that car brought from New Jersey to South Carolina? That's the only question. If he did, he's guilty; if he did not, he is not guilty.

ARGUMENT

1. Contrary to the petitioner's contention (Pet. 5-13), the evidence was sufficient to support the conviction.

The fact that the station wagon was stolen was undisputed. The jury could draw the inference as to the petitioner's knowledge of this from the evidence that he appeared in Spartanburg, South Carolina, on November 30, 1957, to negotiate the sale of the automobile stolen in New Jersey the day before; and that he agreed to accept, for the two automobiles for which neither he nor Kayfield had titles, a sum less than half the value of the cars. Cf. *United States* v. *Slaughter*, 255 F. 2d 770 (C.A. 7); *Melson* v. *United States*, 207 F. 2d 558 (C.A. 4). The petitioner's joint possession with Kayfield of the stolen station wagon was shown by the petitioner's predominant

role in the price negotiations.[3] His insistence that Solesbee make good the $300 debt to Kayfield as part of the complete transaction, his previous presence in Pennsylvania, and his departure with Kayfield indicated that the petitioner had come to South Carolina with Kayfield and was not a mere stranger who just happened to be in the neighborhood. The inference as to the petitioner's guilt is further supported by his attempt to persuade Dever to commit perjury and the petitioner's direction that Kayfield post-date the bill of sale.

Since the evidence was such that a jury might fairly conclude guilt beyond a reasonable doubt, the case was properly submitted to the jury. See *Holland* v. *United States*, 348 U.S.121, 139-140.

2. The parts of the government attorney's closing argument which the petitioner claims were prejudicially erroneous are set out in section 2 of the Statement, *supra*.

a. The prosecutor argued, without objection at the time, that it had not been denied that the petitioner attempted to persuade Dever to say that he had given Kayfield permission to use the station wagon. The petitioner invokes the rule that, since only he could have contradicted this testimony, it was improper for

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[3] The petitioner's leading part in the sale negotiations showing his possession of the automobile is in marked contrast to the type of cases he cites to the effect that mere association with a thief in an automobile is insufficient proof of guilt. See, *e.g.*, *Camilla* v. *United States*, 207 F. 2d 339 (C.A. 6); *United States* v. *O'Brien*, 174 F. 2d 341 (C.A. 7); *Johnson* v. *United States*, 195 F. 2d 673 (C.A. 8).

the prosecutor to comment that the government testimony had not been contradicted (Pet. 14-15). However, if the petitioner had not had this conversation at Dever's hotel room, it is possible that other witnesses could have contradicted Dever by testifying that the petitioner was elsewhere. Mrs. Dever, present at the time, also could have been called, and it cannot be presumed that she would testify falsely. Accordingly, the testimony, if untrue, could have been denied by witnesses other than the petitioner. It is highly unlikely, moreover, that the jury considered the prosecutor's remarks as a direct reference to the petitioner's failure to testify, in view of the repeated admonitions in the final charge that such failure "can't be used against him", and that the jury "must not permit that fact to weigh in the slightest degree against him, the defendant, nor should this fact enter into the discussion or deliberation of the jury in any manner" (R. II, 111).

b. There was no prejudicial appeal (see Pet. 15-16) when the prosecutor referred in the opening part of his argument to government witnesses Clary and Solesbee as "our local people" (R. II, 94), and then much later in the closing half, stated that the petitioner had no business "down in our community" (R. II, 106). It is not likely that the jury got the impression that the local witnesses were good citizens as opposed to the petitioner as a bad outsider from a northern city, since the prosecutor himself stated the local witnesses were not angels (R. II, 94), and defense counsel spoke disparagingly of them (R. II, 101). In any event, after objection, the court in ef-

fect sustained it by accepting the prosecutor's withdrawal of the challenged remarks (R. II, 106). Defense counsel was apparently satisfied with this disposition, and did not ask for a mistrial.

c. The petitioner complains (Pet. 16) that, even though he had not testified and had not made the statement attributed to him, the prosecutor improperly argued that the petitioner said, "No, sir, I was down here; I didn't have anything to do with it. Just down here for the buggy ride" (R. II, 107). This was not presented to the jury, however, as a direct quotation but as the substance of the defense presented by the petitioner's counsel. It was not prejudicial, nor objected to, and essentially a repetition by the prosecutor of defense counsel's prior argument that Kayfield, not the petitioner, had driven the stolen car (R. II, 100, 98) and that the only thing proved against the petitioner was that he had argued about the money (R. II, 101).

3. There is no merit to the petitioner's contention that the court's final charge to the jury (see Statement, *supra*, pp. 5-7) was erroneous in not requiring a finding as to the petitioner's knowledge that the station wagon had been stolen (Pet. 18-21). The court's charge must be read in its entirety, *Boyd* v. *United States*, 271 U.S. 104, 107. When so read it is clear that the jury was required to find that the petitioner knew the car was stolen before a conviction could result. The charge began with the statement that the petitioner was charged with interstate transportation of the stolen station wagon and that "he then knew the said motor vehicle to have been sto-

len" (R. II, 108). Later the court stated that "knowledge that the automobile is stolen may be established by circumstances as well as by direct proof and the question is for you to determine whether he knew the car was stolen; whether he knew that it was; whether he aided or abetted in the transportation of it" (R. II, 111). In view of these references to the petitioner's knowledge, it was not necessary to repeat these in other parts of the charge.

Moreover since no objection was made on this point at the time the charge was given, the petitioner's argument comes too late on appeal. Rule 30, F. R. Crim. P.; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239; *Harris* v. *United States*, 359 U.S. 19, 21.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

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